8.D. THE "MERGER" PROBLEM -- WHEN DO 2 LOTS IN COMMON OWNERSHIP BECOME ONE?

The substandard lot problem (above) deals with whether the use of a subdivision lot is "grandfathered". The "merger" problem, on the other hand, deals with whether the separation of that lot from adjoining property in common ownership, is "grandfathered", so that it can be used separately, and sold separately, without further subdivision approval. Here are the cases:

(i) ***Vachon v. Concord***, 112 N.H. 107 (1972). Concord had a "grandfather" clause in its zoning ordinance which said that a substandard lot could be built on unless adjoining land was in common ownership, in which case it would be treated as merged. The Court upheld this clause in the case, after finding that there had not been the kind of substantial investment in improvements to create a "vested interest" in the separate lots.

QUESTION: Is the Vachon case still good law in light of RSA 674:39 and 676:12, V (both of which were enacted after this case)? **ANSWER:** In my opinion it is, in cases where those statutes no longer apply.

> **EXAMPLE:** Maxwell Smart applies to subdivide "Undercover Acres" into 10 half-acre lots, all on existing roads. A week after the application is accepted, notice is posted for a zoning amendment changing the required lot size to 1 acre. Under 676:12, this change doesn't affect Max's plat, which is then approved and recorded. Max goes abroad on a spy mission, and a year later none of the lots have been sold, and no construction has begun. The protection given by 674:39 is terminated, and the town can now require the lots to be "merged" into 1-acre lots. ["Sorry about that, Chief!"]

> **NOTE - REVOCATION:** Since the enactment of RSA 676:4-a, concerning revocation of planning board approval, it is clear that the clearest way ***procedurally*** to make sure Max's subdivision rights are terminated is to go through a formal ***revocation*** of his approval. Unless the board does this, it will be difficult if not impossible to prevent Max from selling his lots. In my opinion the Court would be very unlikely to set aside such a conveyance, because the purchasers have no reason to suspect that the approved plan's rights had lapsed.

(ii) ***Keene v. Town of Meredith***, 119 N.H. 379 (1979). Mr. Keene had acquired two parcels of land separately, on either side of a public road. The two parcels were taxed as separate lots, and the town had previously issued a building permit for a house on one of the lots, knowing there was already a house on the other. There was no evidence that they had ever been used in conjunction with each other. The Court said they were existing lots which could be sold separately without subdivision approval.

The ***Keene*** case is often ***MISTAKENLY*** cited as saying that a public road always constitutes a "grandfathered" lot line. ***WRONG!*** The road was only one factor. The tax treatment and, especially, the use of the parcels were what made the difference. There are many parcels in New

Hampshire with a house on one side of a road and a barn on the other, used and taxed as a single parcel, where the road would not be a "grandfathered" lot line.

(iii) ***Robillard v. Hudson***, 120 N.H. 477 (1980). Robillard owned two adjoining lots which were substandard. The lots had always been taxed separately. The zoning ordinance contained a "grandfather" clause protecting substandard lots. Robillard's predecessor got a building permit for a duplex on one of the lots. The proposed location of the duplex was too close to the line separating the two lots to comply with side-yard set-backs, but the permit was issued anyway with the understanding that the two lots would be consolidated for zoning purposes. The Court said:

> **"The owner of separate contiguous lots which are otherwise entitled to an exemption from the more restrictive requirements of an amendment to which such (substandard) lots do not conform may lose his advantage by behavior which results in an abandonment or abolition of the individual lot lines... The fact that lots are separately assessed and separately taxed is not conclusive in determining whether separate lots constitute one lot for zoning purposes... Whether they should be so treated must be determined on a case-by-case basis." (120 N.H. at 480, citation omitted)**

(iv) In ***Appeal of Loudon Road Realty Trust***, 128 N.H. 624 (1986), it was held that two parcels separately acquired should be treated as a single lot for tax valuation purposes, based on evidence that:

> **"although the preceding owners treated the properties as two units, and the city has accordingly prepared separate tax bills for two units, there was evidence that the zoning ordinance would legally preclude subdivision into two parcels."**

Thus zoning treatment is evidence for determining tax treatment, as well as vice versa.

(v) ***Mudge v. Precinct of Haverhill Corner***, 133 N.H. 881 (1991). Susan Condodemetraky owned 42.47 acres. 5.5 of those acres contained a 22-unit mobile home park she claimed was "grandfathered" from the ordinance, which now required a density of 1 acre per unit. She claimed she could go ahead and put 22 more units on the remaining 22 developable acres (the rest being wetlands, etc.) ***Wrong***, said the Court. The parcel is ***not*** nonconforming. Since the parcel had never been subdivided in the past (it had all been conveyed via one deed since the founding of the Town), there is simply no reason to think there's a "grandfathered" lot line between the existing mobile home park and the rest of the tract. Thus the undeveloped portion is ***already*** being "used" to meet the density requirements of the ordinance. Ms. Condodemetraky had been getting two tax bills, but the Court said that fact was "not conclusive."

Summary of the "Merger" Problem:

Although the law in this area is still murky, we recommend that, until a court tells us differently, local officials should follow the following set of rough guidelines concerning land in common ownership:

(A) If the parcel(s) in question have been separated as to ownership at some time in the past (that is, if either the current owner ***or his/her predecessors*** acquired the parcels from separate sources at different times), then you should ***presume*** that they are still "grandfathered" as separate lots ***unless*** you can point to some subsequent act on the part of the owner(s) manifesting an intent to abandon the lot lines (such as joint use of the parcels, building a house to close to the line as in ***Robillard***, etc.).

> [Although it is a grey area, it is my opinion that the mere fact that an owner has passively allowed the Town to combine the parcels on its tax records would **not**, standing alone, be enough of a manifestation of an intent to abandon.]

(B) On the other hand if the parcel has ***never*** been separated as to ownership at any time in the past, there is simply ***no*** grounds for claiming "grandfathering" of separate parcels. (The ***Mudge*** case).

(C) If the parcels are substandard, and your zoning ordinance has a "required merger" clause in it (as in ***Vachon***), then by all means apply it. But send ***notice*** to the owner, so that if there is a dispute, the issue will be settled by means of an administrative appeal to the ZBA under RSA 676:5. And ***be sure to change your tax records***. Given the above cases, it is ***essential*** to keep tax treatment consistent with zoning treatment.

(D) If the parcels are substandard, and the zoning ordinance does ***not*** have a "required merger" clause, then there is no ***automatic*** merger. On the other hand, substandard lots may be limited in what they can be used for (see § 8-B, above). And someone who owns adjoining land is much less likely to meet the "hardship" requirement for a variance to build on a substandard lot.

(E) **ABOVE ALL, THE TOWN SHOULD BE PROACTIVE IN THE FOLLOWING WAYS:** The key is to ***try to keep your tax records and zoning records consistent***. I realize that proactive is not the way most land use officials operate – that they are usually in reactive mode. But in order to avoid the proliferation of substandard lots (not to mention lawsuits), it's worth it.

> (1) ***Use Voluntary Merger Statute:*** If there exist adjoining lots in your town which are taxed separately but owned in common, and have never been part of an approved subdivision, officials should ***write to the owner*** to determine if he/she wants to "voluntarily merge" them under RSA 674:39-a (enacted in 1995). Explain the advantages (reduced tax assessment) versus disadvantages (no further separate sales without subdivision approval).

(2) If the person decides ***not*** to "voluntarily merge" them, then the zoning administrator should make a decision whether or not they in fact exist separately for zoning purposes. If there is evidence that the owner has abandoned the lot line (as in *Robillard*), write the owner a letter stating that the town will consider them "merged" for both zoning and tax purposes. The letter should state that this constitutes an administrative decision which can be appealed to the ZBA under RSA 676:5.

(3) ***Use the Revocation Statute:*** If there is a subdivision plat that no longer meets current requirements, and is not "grandfathered," then the Planning Board should use RSA 676:4-a to formally ***revoke*** the approval.